

UNITED STATES TAX COURT
WASHINGTON, DC 20217

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| JOSEPH A. INSINGA, |) | |
| |) | |
| Petitioner, |) | SYM |
| |) | |
| v. |) | Docket No. 4609-12W. |
| |) | |
| COMMISSIONER OF INTERNAL REVENUE, |) | |
| |) | |
| Respondent |) | |

ORDER

This case involves a claim under section 7623(b) for a “whistleblower award”. A hearing in this case is to be set for sometime during the last two weeks of June 2013. (See Order of March 13, 2013.) On March 18, 2013, petitioner filed a “Rule 81 Application to Take the Deposition of Whistleblower Office Program Manager Robert B. Gardner”. We will order respondent to file a response to the application.

Petitioner ostensibly proposes not a discovery deposition but a deposition under Rule 81 “to perpetuate testimony” for that hearing. However, such a deposition “shall be taken only where there is a substantial risk that the person * * * will not be available at the trial of the case”. Rule 81(a). The application alleges that Mr. Gardner “is slated to retire from the Internal Revenue Service at the end of June, 2013, or upon some date in July, 2013”, but in so stating petitioner has made no showing of any substantial risk that Mr. Gardner will not be available for a June 2013 hearing. We will nevertheless order respondent to file a response stating whether Mr. Gardner will be available.

Petitioner’s application also foresees, beyond our June 2013 jurisdictional hearing, a future “trial of these many complicated claims and transactions”, which could take place “many years” from now, and he proposes to perpetuate testimony

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for that trial as well. However, we will not prejudge the jurisdictional issue and assume that a future trial will take place in this case; only if we determine that we do have jurisdiction could we permit a deposition under Rule 81, which is entitled “Depositions in Pending Case”. (Petitioner has made no application under Rule 82.) Nor will we assume the evidentiary scope of a trial in a “whistleblower” case.

To anticipate now-obvious potential disputes in this case, in order to avoid unnecessary delay in preparation for the June 2013 hearing, we make two additional points: First, petitioner proposes a deposition of a particular named human person, Mr. Gardner, not of the IRS as an organization who must designate a person to testify (cf. Rules 81(c), 74(f)). However, the documents described in paragraph E of the application appear to be documents that belong not to Mr. Gardner personally but to respondent. Petitioner’s proper means for obtaining documents from respondent is not an application under Rule 81 to depose Mr. Gardner but rather a request for documents under Rule 72 (after the mandatory “informal consultation” that Rule 70 requires before any formal discovery). The Court expects that respondent will cooperate promptly with informal requests for documents and will treat the application as such a request.

Second, although petitioner’s application is under Rule 81 to perpetuate testimony, the application states that “Petitioner will seek to elicit all of Agent Gardner’s properly discoverable knowledge”--making it appear possible that the intended purpose of the deposition is actually discovery. If upon reflection petitioner concludes that what he seeks is discovery and not perpetuation, then he should withdraw his Rule 81 application. The Court would not allow Rule 81 to be employed in such a manner as to frustrate the clear purposes of Rule 70 (requiring informal consultation before formal discovery) and Rule 74(c)(1)(B) (allowing discovery depositions without consent only in “extraordinary” circumstances). On the other hand, we do not want the June 2013 hearing to be unnecessarily lengthy and inefficient. The Court will therefore invite the parties to suggest, during the upcoming telephone conference, means for assuring fair and efficient informal consultation (under Rule 70), stipulation (under Rule 91), and examination of witnesses at trial.

It is

ORDERED that, no later than March 29, 2013, respondent shall file a response to petitioner’s application, in which respondent shall state whether he can

assure the attendance of Mr. Robert Gardner at the hearing to be held in this case in June 2013.

(Signed) David Gustafson
Judge

Dated: Washington, D.C.
March 21, 2013